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No. 94-329

In The

Supreme Court of the United States

October Term, 1994

RONALD W. ROSENBERGER, *et al.*,

Petitioners,

v.

THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state university is constitutionally required to directly subsidize with public funds the preparation and distribution of a religious student group's publication designed to advocate a particular religious belief.

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STATEMENT OF THE CASE

The Respondents, the Rector and Visitors of the University of Virginia, *et al.*, respectfully set forth the following pertinent facts to correct and clarify petitioners' statement of the case.

This case involves the long-standing policy of the University of Virginia not to fund religious student organizations and activities. The University determined that the *Wide Awake* student group was ineligible to receive

funding under the Student Activity Fee ("SAF") Guidelines because of its pervasively religious purpose: *Wide Awake's* avowed "mission is to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means." *Rosenberger v. Rector and Visitors of the University of Virginia*, 18 F.3d 269, 272 (4th Cir. 1994). *Wide Awake's* assortment of journal articles, portfolio of advertisements and physical appearance[1] all underscore its self-described proselytizing mission. Petitioners themselves concede that "*Wide Awake* constitutes a 'religious activity' within the meaning of the Guidelines" and agree with the Court of Appeals that the publication is " 'marked by unflagging invocation of religious, specifically Christian themes.' " Petition for Writ of Certiorari, at 7.[2]

Contrary to petitioners' assertion, respondents *do* dispute petitioners' claim that *Wide Awake* "conformed to all applicable, content-neutral funding eligibility requirements, as set out in the Guidelines, other than the prohibition relating to 'religious activities.' " Pet. for Cert. at 7. If, as petitioners claim, *Wide Awake* indisputably fell within the category of "student news, information, opinion, entertainment, or academic communications media group," it would have been funded. Instead, it falls

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[1] As the Court of Appeals noted, "the Christian symbol of the Cross lying in a dark oval field, is printed at the top of each page; another Cross marks the end of each contribution." *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 18 F.3d 269, 273 (4th Cir. 1994).

[2] Hereinafter, Pet. for Cert., at ___.

within the category of religious exhortation, which is outside SAF funding eligibility.

Wide Awake did not receive University funding from the Student Council, because the SAF Guidelines prohibit the funding of religious activities and organizations. The funding guidelines, adopted in 1970, "charge the Student Council with administering the SAF 'in a manner consistent with the educational purpose of the University as well as with State and Federal law.' " *Rosenberger*, 18 F.3d at 271. Religious groups are by no means singled out, but represent only one of many categories which are ineligible for funding under the Guidelines. *See Id.*

On July 11, 1991, members of Wide Awake Productions and editors of *Wide Awake* magazine filed suit in the federal district court for the Western District of Virginia against the Rector and Visitors of the University of Virginia.[3] Petitioners claimed that the exclusion of religious activities from funding under the SAF policy had violated their free speech, free exercise of religion and equal protection rights under the First and Fourteenth Amendments to the United States Constitution, as secured by 42 U.S.C. § 1983, and sought declaratory and injunctive relief as well as compensatory damages.[4]

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[3] Ronald J. Stump was also designated as a defendant in his official capacity as Associate Dean of Students at the University.

[4] Along with its Answer denying that it had violated *Wide Awake's* constitutional rights, the University filed a motion to dismiss *Wide Awake's* claim for compensatory damages on Eleventh Amendment immunity grounds. The District Court found it unnecessary to decide this issue in light of its summary judgment ruling in the University's favor. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 795 F. Supp. 175, 178, n. 4 (W.D. Va. 1992).

Both parties moved for summary judgment. Satisfied that there were no genuinely disputed issues of material fact, the district court following oral argument granted summary judgment in the University's favor on all issues. *Wide Awake* appealed the district court's order entered May 20, 1991.

In affirming the judgment of the district court, the Court of Appeals properly recognized that while the Establishment Clause does not prohibit government from accommodating or incidentally benefitting religion, petitioners are demanding a direct and substantial governmental subsidy of religion:[5]

> Direct monetary subsidization of religious organizations and projects . . . is a beast of an entirely different color. A proper respect for the Establishment Clause compels the Rector and Visitors to pursue a course of "neutrality" toward religion. Yet providing SAF monies to

[5] The Court of Appeals did not consider petitioners' free exercise claim: "[i]n granting the University's motion for summary judgment, the district court ruled that the denial of funding to Wide Awake Productions did not unconstitutionally burden the plaintiffs' free exercise of religion . . . Because the plaintiffs failed to assign error to this holding on appeal, . . . we consider it abandoned, and decline to address it herein." *Rosenberger*, 18 F.3d at 277, n. 23. As to petitioners' equal protection claim, the Court of Appeals similarly found that appellants-petitioners had not contested the district court's factual finding that the University had not acted with discriminatory intent in denying funding to *Wide Awake*. *Id.* at 288. "Moreover, the plaintiffs' failure to argue the existence of discriminatory intent as a matter of law on appeal deprives us of jurisdiction to consider the merits of their equal protection claim." *Id.*

> defray the publication costs of *Wide Awake* inevitably would advance *Wide Awake's* Christian mission: "to encourage students to consider what a personal relationship with Jesus Christ means." . . . Because *Wide Awake* is a journal pervasively devoted to the discussion and advancement of an avowedly Christian theological and personal philosophy, for the University to subsidize its publication would, we believe, send an unmistakably clear signal that the University of Virginia supports Christian values and wishes to promote the wide promulgation of such values. Since offering SAF funds to the members of Wide Awake Productions would excessively entangle the University of Virginia with the propagation of the Christian religion, we hold that the Rector and Visitors have proved the existence of a compelling state interest in complying with the Establishment Clause.

Rosenberger, 18 F.3d at 285.

Respondents disagree with petitioners' suggestion that the Court of Appeals held that the Establishment Clause "requires" discrimination against religion, *see* Pet. for Cert. at 12, and seriously doubt that any court would arrive at such a conclusion given both our country's religious heritage and the obvious counterweight of the free exercise clause. In fact, the Court of Appeals specifically stated that the Establishment Clause "compels the Rector and Visitors to pursue a course of 'neutrality' toward religion." *Rosenberger* at 285. This holding was based on the court's factual finding that if the University was required to fund *Wide Awake*, it could not avoid

"state sponsorship" of religion, and "excessive entanglement" in governmental supervision of religion. *See Id.*

Respondents also disagree with petitioners' perception that the Court of Appeals held that the funds were not distributed in a viewpoint neutral manner. *See* Pet. for Cert. at 11. The Fourth Circuit actually held that the University must demonstrate a compelling interest in order to deny *Wide Awake* funding because the SAF Guidelines categorize groups according to content. The Court of Appeals did not hold, as the petitioners suggest, that the University had discriminated against *Wide Awake* on the basis of its point of view. The Court of Appeals merely mentioned in dicta that "when funds are made available to CIOs generally, they must be distributed in a viewpoint-neutral manner, absent considerations of equal constitutional dignity." *Rosenberger*, 18 F.3d at 280. Petitioners have distorted the Court of Appeal's holding by quoting the court's words about "viewpoint discrimination" out of context, and using the terms "content" and "viewpoint" interchangeably. *See* Pet. for Cert. at 11. This distinction is important because if viewpoint discrimination were deemed to occur every time a public university creates categories for funding, every student group declared ineligible for funding would be able to attack the school's decision as impermissible viewpoint discrimination.

SUMMARY OF REASONS FOR DENYING WRIT

No important federal question is presented. The holding below turns on the special circumstances of a

state institution of higher education, which must make distinctions in allocating limited funds to student activities and organizations in order to fund those activities most related to its educational purpose. This is not a case where government has sought to censor speech. This is a case where government has rightfully declined to subsidize with public funds the preparation and distribution of religiously proselytizing materials. Moreover, the Court of Appeals' holding is not in conflict with any decision of this Court or that of *any* other United States Court of Appeals. Of the forty-one cases cited in their brief, petitioners fail to cite a single case approving direct governmental funding of a pervasively religious activity.

ARGUMENT

I. NO IMPORTANT FEDERAL QUESTION IS PRESENTED

A. THIS IS NOT A CASE WHERE RELIGION HAS BEEN SINGLED OUT FOR DISCRIMINATORY TREATMENT

The University's "Student Activity Fee Statement of Purpose and Funding Guidelines" make clear that religious activities and organizations are only one of many categories of student groups which are ineligible for funding. Specifically:

> The Board of Visitors has determined that fraternities, sororities, honor societies, political organizations, religious organizations, and special status student organizations not charged by the Board of Visitors are ineligible for funds from

> the student activities fee. An organization is also ineligible when admission is exclusionary in nature and not open to all students or if membership is restricted by reason of age, citizenship, color, disability, gender, race, religion, national origin, political affiliation, sexual orientation, or status as a disabled veteran or veteran of the Vietnam era. Notwithstanding these requirements, a student organization may restrict membership based on ability to perform the activities related to the organization's purpose.

Funding Guidelines, reprinted in Pet. for Cert. at 61a, 62a.

"The Board of Visitors has further determined that the following expenditures and activities do not relate to the educational purpose of the University and thus are not eligible for funding": honoraria or similar fees; religious activities; social entertainment or related expenses; philanthropic contributions and activities; political activities; and activities which would jeopardize the University's tax exempt status. *Id.*, at 62a-63a.

Petitioners' assertion that "this explicit discrimination on the basis of viewpoint would violate the Free Speech and Press Clauses if the viewpoint expressed were nonreligious" oversimplifies the SAF funding scheme. This argument suggests that the Guidelines divide student activities into two categories: religious and nonreligious, the former of which is ineligible for funding, the latter of which is not. However, the fact that

many nonreligious activities are also ineligible for funding undermines petitioners' logic.[6]

For example, if the student Democratic or Republican Club sought funding for campaign literature, or for a magazine which advocated their political platform, funding would be denied under the Guidelines. However, applying petitioners' reasoning, political groups would be able to argue that they were denied funding based on their point of view. They would also claim that, despite their dominant purpose of political advocacy, they should

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[6] Petitioners' assertion that the University "discriminates among various religious viewpoints," citing as "example[s]" the funding of the Muslim Students Association and the Jewish Law Students Association (Pet. for Cert. at 16, n. 8), is belied by the record. The undisputed facts established that these two student groups were funded as "cultural" organizations; neither embraced an evangelical mission nor received funding for any religious activity. The record reviewed by the district court also revealed that another group plaintiffs-petitioners initially assailed as evincing unequal treatment, Black Voices, declined to seek SAF funding after the organization shifted its purpose from simply singing Gospel music as a black cultural activity to engaging in evangelizing as a religious activity.

It is difficult to reconcile petitioners' persistent argument of "viewpoint discrimination" with the district court's finding on the equal protection issue that petitioners presented no evidence of "discriminatory intent," a finding petitioners did not pursue on appeal. *See, Rosenberger*, 18 F.3d at 288. Furthermore, in testing the University's funding decision under the Establishment Clause, the Court of Appeals declared that "[t]he record gives us no reason to doubt that the Rector and Visitors' expressed purposes are 'sincere and not a sham.' . . . Therefore, we hold that the guidelines' proscription against funding of 'religious activities' is not motivated wholly by an impermissible purpose." *Id.* at 284.

receive governmental monetary support as "student news, information or opinion." A philanthropic activity or a student Ku Klux Klan organization could make similar viewpoint discrimination arguments if denied funding under the Guidelines. A policy which defines eligibility for any benefit must make some reasonable distinctions based on the content of the activities in question. While the University does not fund religious activities, neither does it uniformly fund all nonreligious activities.

B. THIS CASE DOES NOT PRESENT A "RECURRING AND CONTENTIOUS ISSUE"

Petitioners have cited no other cases that have considered this identical legal issue. Petitioners do cite *Tipton v. University of Hawaii*, in which the Ninth Circuit Court of Appeals affirmed the district court's grant of summary judgment in favor of the University of Hawaii and its policy with regard to funding of student activities. 15 F.3d 922 (9th Cir. 1994). However, the *Tipton* case, which was also resolved on summary judgment, hardly supports the notion that this is a "recurring and contentious issue." Although the Court of Appeals in *Tipton* expressed "no opinion whether the events for which [the student religious organization] sought funding . . . could be subsidized without violating the Establishment Clause," *Tipton*, 15 F.3d at 926, n. 3, the Court allowed the University "wide latitude in adopting a funding policy to allocate the limited resources available to promote students' extracurricular activities." *Id.* The court also suggested that a university policy excluding the funding of

all religious groups would "likely [be] permissible . . . so long as it is uniformly applied." *Id.* at 928.

Petitioners have not established that an important federal question has been implicated through the adoption of funding guidelines at various universities. Nonetheless, if this Court were to reverse the Court of Appeals decision, the effect would be to create recurring contention, since the reversal would invalidate any eligibility requirements for funding student activities and organizations. If the government cannot exclude religious activities and organizations from public funding in order to avoid a violation of the Establishment Clause, it logically follows that all other forms of nonreligious expression, protected by the Free Speech clause and not restricted by the Establishment Clause, would have to be funded also. As a consequence, funds would have to be either equally divided among all student groups who want them or distributed on a first-come, first-serve basis. Such a proposition would effectively emasculate "the right of the University to make academic judgments as to how best to allocate scarce resources." *Widmar v. Vincent*, 454 U.S. 263, 276 (1981).

II. THE HOLDING BELOW IS CONSISTENT WITH DECISIONS OF THIS COURT AND LOWER COURTS

Petitioners' attempt to mesh all cases dealing with the Establishment Clause may, at first blush, create the appearance of a conflict among various courts and opinions. However, as Justice O'Connor recently made clear,

"[e]xperience proves that the Establishment Clause cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches." *Bd. of Educ. of Kiryas Joel v. Grumet*, 114 S.Ct. 2481, 2499 (1994) (O'Connor, J., concurring).[7]

A. THE ESTABLISHMENT CLAUSE DOES NOT REQUIRE DISCRIMINATION AGAINST RELIGIOUS SPEECH; TO THE CONTRARY, COURTS HAVE CONSISTENTLY HELD THAT THE ESTABLISHMENT CLAUSE REQUIRES GOVERNMENT NEUTRALITY TOWARD RELIGION

Petitioners assert the obvious when they note that "public universities may not deny funding to student groups or publications on the basis of their viewpoint." Pet. for Cert. at 15, citing *Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 361 (8th Cir. 1988). However, the *Rosenberger* case does *not* involve a situation where a student group was denied University recognition or access to campus facilities because of its speech. Nor does the case

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[7] The fact that Justice O'Connor made these statements in the course of critiquing a rigid application of the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), has no bearing on the case at hand. Respondents note that the outcome of this case is not contingent upon strict adherence to the *Lemon* test. The Court of Appeals' holding is supported by cases decided prior to *Lemon*. *See, e.g., Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). Even if this Court abandons the *Lemon* test altogether, there is no reason to expect that all principles of the Establishment Clause developed by the Supreme Court over the years will be rendered obsolete.

involve administrative censorship or as in *Gohn*, withdrawal of financial or physical resources because the student group's viewpoint was found objectionable.

Petitioners argue that the *Rosenberger* and *Tipton* decisions are in conflict with other cases holding that a state cannot discriminate against religious speech in a public forum. *See, e.g., Fairfax County School Bd. v. Fairfax Covenant Church*, 17 F.3d 703 (4th Cir. 1994), *cert. denied*, 114 S.Ct. 2166 (1994).[8] Petitioners also rely on this Court's holding that excluding religious speech from the use of facilities in nonpublic forums on the basis of the speaker's religious point of view constitutes impermissible viewpoint discrimination. *Lamb's Chapel v. Center Moriches School Dist.*, 113 S.Ct. 2141 (1993). However, whether the forum is public, limited public or nonpublic, the crucial distinction between these cases and the case at hand is that they all involved general access to physical space, not a direct and substantial payment of government funds. *See also Good News/Good Sports Club v. School Dist.*, 28 F.3d 1501 (8th. Cir. 1994).

The standard for review before this Court is not whether petitioners find the principles derived from a comparison of various cases construing different aspects of constitutional law incongruous. Rather, the proper

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[8] Respondents note that two of the cases cited by petitioners, *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973), and *Fairfax County School Board v. Fairfax Covenant Church*, 17 F.3d 703 (4th Cir. 1994), *cert. denied*, 114 S.Ct. 2166 (1994), were decided by the Fourth Circuit, the second only months before *Rosenberger*. Though theoretically possible, it seems unlikely that the Fourth Circuit would have decided *Fairfax Covenant* and *Rosenberger* in a contradictory manner.

inquiry is whether a federal court of appeals "has rendered a decision in conflict with the decision of another United States court of appeals on the same matter" or "has decided a federal question in a way that conflicts with applicable decisions of this Court." Sup. Ct.R. 10.1.

Cases involving equal treatment of religious and nonreligious speech in granting access to facilities have absolutely no bearing on this case. Religious and nonreligious speakers can simply wait their turn to use physical space; the allocation of public funds, on the other hand, is not only a very direct subsidy, it requires government discretion and supervision. Nonetheless, petitioners have been contending throughout this protracted litigation that *Widmar v. Vincent*, 454 U.S. 263 (1981), and more recently, *Lamb's Chapel*, control the analysis of this case. Respondents maintained and continue to maintain that public forum cases, of which *Widmar* is the chief example, are entirely distinguishable from the case at hand, because they concern physical space, not funding. The Court of Appeals reached the same conclusion:

> [T]he proper analysis of this case lies under the line of authority dealing with content-based discrimination relating to government-generated benefits or burdens. The long line of public forum cases have taken "forum" in a fairly literalistic way involving physical space, and we do not see how it advances the jurisprudence to wrench that word out of its accepted form to encompass this type of case already subject to First Amendment scrutiny.

Rosenberger v. Rector and Visitors, 18 F.3d at 287.

The University would clearly be prohibited from denying religious groups access to generally available meeting space on the University grounds, and in fact it provides such access. However, when a state university is asked to pay for speech, the issue is no longer whether private speech should passively be allowed to occur, but whether the state may directly subsidize a religious belief with public funds. The potential harm to religion is manifest: government largess comes with its "strings" including supervision and audits.[9]

The University's treatment of religion has nothing to do with whether religious belief and practice is popular or unpopular. Like the religion clauses of the First Amendment, the funding guidelines adopted by the Board of Visitors were not designed to punish or penalize religious activity, but to ensure government neutrality

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[9] Petitioners' argument that religion should never be treated differently from other forms of activity under the federal Constitution would strip the First Amendment religion clauses of any meaning. Although religion or religious activity may not be eligible for certain benefits the state offers to secular groups or activities, this is not the end of the inquiry. In other contexts, the Free Exercise clause of the First Amendment affords religion advantages over other forms of activity and expression protected only by the Free Speech clause.

For example, whereas the *Journal of Law & Politics* would not be permitted, as a Contracted Independent Organization (CIO), to discriminate on the basis of religion or other impermissible factors in the selection of its editorial board, *Wide Awake* would presumably be permitted to select its Editor on the basis of the strength of the individual's religious convictions. *Wide Awake* is protected by the free exercise clause; the *Journal of Law & Politics* and all other nonreligious student publications and organizations are not.

toward religion so that all religious faiths may flourish without government intervention or supervision. As the Court of Appeals recognized:

> The Rector and Visitors have not attempted to ban the publication of *Wide Awake*; indeed, they have supported its religious mission by allowing the members of Wide Awake Productions access to University meeting and printing facilities equal to that afforded all other CIOs. The University permits the plaintiffs to distribute *Wide Awake* on its grounds without limitation.

Rosenberger, 18 F.3d at 284.

B. THIS CASE DOES NOT PRESENT THIS COURT WITH A MEANINGFUL OPPORTUNITY TO REFINE ESTABLISHMENT CLAUSE JURISPRUDENCE; THE ALLOCATION OF PUBLIC FUNDS TO PAY FOR RELIGIOUS PROSELYTIZING IS NOT "NEUTRALITY," AND CONFLICTS WITH THE ESTABLISHMENT CLAUSE

Petitioners concede "that the decision below . . . finds support in older cases." Pet. for Cert. at 21. However, according to petitioners, there is a conflict between two categories of cases because one line requires neutrality with respect to public facilities, and the other requires discrimination with respect to "direct monetary subsidization." Pet. for Cert. at 22. To provide evidence of this purported conflict, petitioners cite a hodgepodge of cases dealing with access to facilities, distribution of written materials in public school, and religious symbols in a public forum. *See* Pet. for Cert. at 18-19 and 20, n. 11 and

n. 12. The cases are all actually crystal clear: when direct monetary subsidization is involved, there is an Establishment Clause violation because the benefit to religion is *not* neutral. Petitioners beg the question by framing the central issue as whether a "wide range of activities" receives the "neutral" benefit being offered. No court has ever held that direct funding of religious activities and programs is neutral.

Respondents readily concede that it would be wrong for the University to fund some political or religious activities and not others, or to defund publications for expressing a particular viewpoint, or to refuse to fund organizations which qualify for funding under the Guidelines because of the views of the organization. *See, e.g., Gay & Lesbian Students Association v. Gohn*, 850 F.2d 361 (8th Cir. 1988); *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973). However, pure viewpoint discrimination is very different from content-based decisions which are viewpoint neutral. In his concurring opinion in *Widmar v. Vincent*, Justice Stevens emphasized that there is nothing constitutionally suspect in a public university making content-based classifications or assessments in allocating limited resources:

> In performing their learning and teaching missions, the managers of a university routinely make countless decisions based on the *content* of communicative materials. They select books for inclusion in the library, they hire professors on the basis of their academic philosophies, they select courses for the inclusion in the curriculum, and they reward scholars for what they have written. In addition, in encouraging students to participate in extracurricular activities,

> they necessarily make decisions concerning the *content* of those activities.

454 U.S. 263, 278 (1981).

Indeed, numerous cases provide support for the proposition that the state cannot directly fund religious activity without violating the Establishment Clause. In *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947), decided well before *Lemon v. Kurtzman*, Justice Black explained:

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . **No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.** Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

Everson v. Bd. of Ed., 330 U.S. at 15. (emphasis added). Even before school prayer and Bible reading in public school classrooms were thought to violate the Establishment Clause, *see Engel v. Vitale*, 370 U.S. 421 (1962) and *Abingdon School Dist. v. Schempp*, 374 U.S. 203 (1963), the Supreme Court declared that the Establishment Clause prohibits the use of public funds, of any amount, to support religious activities.[10] Perhaps direct governmental funding of religious activity so obviously violates

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[10] It was permissible for the state to fund the cost of bus transportation, at issue in *Everson*, because bus transportation is not a religious activity.

the Establishment Clause that the point is not always explicitly made. However, the principle has consistently been enunciated in a variety of religion cases.

For instance, this Court has invalidated, on Establishment Clause grounds, various state programs that sought to subsidize sectarian practices and activities. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971) (subsidy of parochial school salaries for teachers of secular subjects); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973) (maintenance and repair grants for parochial schools); *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973) (reimbursement to parochial schools for expenses of teacher-prepared test); *Sloan v. Lemmon*, 413 U.S. 825 (1973) (tuition reimbursement and grant program for parochial schools); *Meek v. Pittenger*, 421 U.S. 349 (1975) (loan of instructional materials and equipment to non-public schools); *Wolman v. Walter*, 433 U.S. 229 (1977) (field trip transportation services to non-public school students); *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985) (use of public school programs and personnel on private school premises).

In the few cases involving governmental aid to higher education, this Court likewise emphasized that the Establishment Clause prohibits governmental financial assistance to higher education institutions for pervasively sectarian purposes. *See Tilton v. Richardson*, 403 U.S. 672 (1971); *Hunt v. McNair*, 413 U.S. 734 (1973); *Roemer v. Board of Public Works*, 426 U.S. 736 (1976). In the university context:

> **Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that**

> a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise secular setting.

Hunt v. McNair, 413 U.S. at 743.

This Court's opinion in *Witters v. Wash. Dept. of Services for Blind*, 474 U.S. 481 (1985), is not to the contrary. The *Witters* decision distinguished between two scenarios in which "money previously in the possession of the State is conveyed to a religious institution." *Witters*, 474 U.S. at 486. While there is no Establishment Clause violation when a State issues a paycheck to one of its employees who then donates all or a part of the money to a religious institution, *Id.*, 474 U.S. at 486-87, "[i]t is equally well settled . . . that the State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is 'that of a direct subsidy to the religious school' from the State." *Id.*, 474 U.S. at 487, citing *Grand Rapids School District v. Ball*, 473 U.S. at 394.[11] Relying on *Witters*, this Court reiterated in *Zobrest v. Catalina Foothills School Dist.*, 113 S.Ct. 2462, 2466 (1993), that "government programs that neutrally provide benefits to a broad class of citizens

[11] Moreover, on remand, the State Supreme Court, at this Court's invitation, held in *Witters* that the state constitutional prohibition against applying public monies to any religious instruction prohibited the granting of the neutral aid for a religious education. *Witters v. State Com'n for the Blind*, 771 P.2d 1119 (Wash. 1989). The University would similarly be prohibited from funding religious student organizations under Article IV, § 16 of the Virginia Constitution, as respondents argued in briefs submitted to the district and appellate courts below.

defined without reference to religion are not readily subject to an Establishment Clause challenge. . . . "

Nor do cases involving indirect subsidies to religious and secular activities alike have any bearing on this case. *See, e.g., Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). As noted by the Court of Appeals, the *Rosenberger* case, which "involves a direct governmental subsidy of religious expression rather than a mere exemption from the payment of duties, . . . is not directly on point with *Texas Monthly*." *Rosenberger*, 18 F.3d at 283, n. 31. Although exempting religion from a burden (such as a tax) results in an "indirect economic benefit," "[t]ax exemptions . . . constitute mere passive state involvement with religion and not the affirmative involvement characteristic of outright governmental subsidy." *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 691 (1970) (Brennan, J., concurring).

Reversal of the Court of Appeals' decision would also expose the University to suits by other students or parents for refunds of the student activity fee.[12] Although this issue has not been treated uniformly by the courts, if the University is required to fund religious organizations and activities, it risks expensive challenges from individuals who object to such use of the mandatory student

[12] Respondents disagree with petitioners' claim that this issue "is not raised in this case." Pet. for Cert. at 15, n. 7. Respondents raised this issue both at the district court and Court of Appeals level. Most recently, pursuant to Fed. R. App. P. 28 (j), respondents called the Court of Appeals' attention to the California Supreme Court's opinion in *Smith v. Regents of the University of California*, 4 Cal. 4th 843, 844 P.2d 500, *cert. denied*, 114 S.Ct. 181 (1993) during the pendency of the case.

fees. In addition to raising Establishment Clause objections, litigants could draw upon decisions of this Court that restrict the use of mandatory professional association fees and union dues for activities that deviate from the organization's established purpose. *See Keller v. State Bar of California*, 496 U.S. 1 (1990); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). The decision of the California Supreme Court in *Smith v. Regents of the University of California*, 4 Cal. 4th 843, 844 P.2d 500, *cert. denied*, 114 S.Ct. 181 (1993), illustrates the basis and impact of a challenge from students who object to uses of mandatory fees for purposes that are not related to the University's educational mission. As petitioners themselves point out, some decisions "have permitted dissenting students to demand refunds of portions of the student activities fee that are used to support the expression of ideological viewpoints with which they disagree." Pet. for Cert. at 15, n. 7.

If required to fund *Wide Awake*, in the short term, the University would be supporting a single religion in derogation of the Establishment Clause. As competing religions began to seek University funding, University agents would be compelled to scrutinize the worth of various religious organizations and activities in an attempt to decide how much money each group should receive, why one should receive more than another, and why one project or mission would be worthier than another.

Petitioners' "constitutional challenge" to the funding guidelines appears to be a constitutional challenge to the Establishment Clause itself. If religion cannot be treated differently than political ideas, ideology or viewpoints on

various issues, what does the Establishment Clause stand for? Petitioners' suggestion that the Free Speech Clause should operate to nullify the Establishment Clause is not supported by the Constitution, opinions rendered by this Court or any other federal court, or common sense.

Even if the case could be analyzed within a different framework which does not require the compelling interest standard, this case does not offer the Court a meaningful opportunity to differentiate between cases involving the government's ability to allocate its limited resources, and cases involving equal access of religious and secular groups to neutral benefits. This case has evolved into an academic debate about the logic and soundness of doctrine itself, and does not present a true conflict among courts on issues relating to the First Amendment.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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